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11
12 UNITED STATES DISTRICT COURT
13 FOR THE NORTHERN DISTRICT OF CALIFORNIA
14

15 RPOST INTERNATIONAL LTD., RPOST US,
16 INC., and AVION MICROSERVICES, INC.

17 Plaintiff,

18 vs.

19 AUTHENTIX - AUTHENTICATION

20 TECHNOLOGIES LTD., an Israel corporation;
21 PROPAT INTERNATIONAL CORP., a Texas
corporation, and DOES 1 through 10.

22 Defendants.
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Civil Action No. CV-06-1193 (EMC)

NOTICE OF MOTION AND
DEFENDANT PROPAT
INTERNATIONAL
CORPORATION'S MOTION TO
DISMISS FOR LACK OF SUBJECT
MATTER JURISDICTION UNDER
RULE 12(b)(1); TO DISMISS FOR
LACK OF PERSONAL
JURISDICTION UNDER RULE
12(b)(2); TO DISMISS FOR
IMPROPER VENUE UNDER RULE
12(b)(3), OR ALTERNATIVELY TO
TRANSFER VENUE UNDER 28
U.S.C. § 1404(a) AND
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF

Date: May 31, 2006
Time: 10:30 a.m.

1 Defendant, PROPAT INTERNATIONAL CORP. ("Propat"), hereby gives notice of its
2 Motion to Dismiss this Action for Lack of Subject Matter Jurisdiction under Rule 12(b)(1); Lack
3 of Personal Jurisdiction under Rule 12(b)(2); for Improper Venue under Rule 12(b)(3) or
4 alternatively, to transfer this Action to the Central District of California under 28 U.S.C. §
5 1404(a). The hearing on this Motion is scheduled for May 31, 2006 at 10:30 a.m.

6 Defendant Propat submits its Motion to Dismiss Plaintiff RPost International Ltd., RPost
7 US, Inc., and Avion Microservices, Inc.'s ("RPost") Complaint against Propat for lack of subject
8 matter jurisdiction, lack of personal jurisdiction, and improper venue, and in the alternative to
9 transfer venue to the Court of the Honorable James V. Selna, in the Central District of California.

10 The issues to be decided in this motion are whether this Court has subject matter
11 jurisdiction under the Declaratory Judgment Act to address the issues raised in the Complaint
12 against Propat. Second, whether this Court may properly exercise personal jurisdiction over
13 Propat, a Texas corporation. Third, whether this action should be dismissed for improper venue.
14 Finally, whether this action should be transferred to the Court of the Honorable James V. Selna
15 in the Central District of California who has a continuing jurisdiction under a Protective Order
16 relating to the maintenance of confidential information resulting from a patent infringement suit
17 between RPost and Propat over which he presided and which is currently pending appeal.

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STATEMENT OF FACTS

This action is related to two previously filed actions that were consolidated into one action before the Honorable James V. Selna in the U.S. District Court for the Central District of California. That case is currently in the briefing stage on appeal before the U.S. Court of Appeals for the Federal Circuit having case nos. 2006-1222, -1223, 1270.

The first action was captioned Propat International Corp. v. RPost, Inc., and RPost US, Inc., and was originally filed in the United States District Court for the Northern District of California having case number CV-02-02473 (MJJ). Judge Jenkins granted RPost's motion to transfer venue to the Central District of California. The second action captioned Propat International Corp. v. RPost International, LTd. was filed in the United States District Court for the Southern District of Texas. On motion from RPost, the Court also transferred venue to the Central District of Texas. Judge Selna consolidated the cases into one action having case number CV-03-1011 (JVS). (hereinafter "the Prior Pending Action") In the Prior Pending Action, Propat asserted patent infringement of the '219 Patent by the RPost Registered E-Mail system.

The following facts relate to the Prior Pending Action and are relevant to this motion:

1. On January 14, 2005, Judge Selna issued a claim construction order for the '219 Patent.
2. On January 24, 2005, RPost filed a motion for reconsideration of the claim construction and in the alternative a motion to certify the claim construction order for interlocutory appeal. On February 9, 2005, Judge Selna denied both the motion for reconsideration and the request to certify the order for interlocutory appeal.
3. Later that year, the parties filed respective cross motions on the issue of infringement. After hearing oral arguments on the respective motions, Judge Selna denied RPost's motion and granted Propat's motion for partial summary judgment of infringement in its order dated August 17, 2005. In his order, Judge Selna found that the '219 Patent was not invalid and that the RPost Registered E-Mail system infringed the '219 Patent.
4. A trial date on the remaining issues in the case including damages and the

individual liability of some of the defendants was set for September 27, 2005. On September 23, 2005, Judge Selna granted Propat's request to continue the trial date due to emergency hurricane evacuation orders that Propat's principle and its lead counsel were responding to in Houston, Texas. On September 30, 2005, Judge Selna held a telephone conference with counsel for the parties and reset the trial date for February 14, 2006. Upon the urging of Propat's counsel, Judge Selna allowed Propat the opportunity to file a motion regarding the issue of standing.

5. On or about October 13, 2005, RPost also filed a motion to dismiss the action for lack of standing. In its motion, RPost requested the District Court to vacate its previous orders regarding the claim construction and finding of infringement. On October 31, 2005, Propat in compliance with Judge Selna's previous order filed a motion to establish standing. On November 21, 2005, Judge Selna heard oral arguments on the two motions regarding standing. On November 28, 2005, Judge Selna denied Propat's motion and granted the RPost's motion to dismiss for lack of standing. Judge Selna ordered the dismissal to be without prejudice.

6. On December 22, 2005, Judge Selna entered his Final Judgment dismissing the action without prejudice and vacating the claim construction order and the order granting Propat's motion for partial summary judgment of infringement. Propat appealed the finding of a lack of standing. RPost's notice of cross appeal was filed on January 5, 2006, seeking an appeal of Judge Selna's claim construction order and Judge Selna's finding of infringement.

7. In his Final Judgment, Judge Selna reserved continuing jurisdiction under the protective order.

8. Attached hereto as Exhibit A, is the Final Judgment from the Prior Pending Action. Attached hereto as Exhibit B, is Judge Selna's order relating to Propat's standing.

ARGUMENT

I. THE COURT SHOULD DISMISS THIS ACTION FOR LACK OF SUBJECT MATTER JURISDICTION

A. Legal Standard for Bringing a Declaratory Judgment Action.

Pursuant to Fed. R. Civ. P. 12(b)(1), this Court should dismiss this action against Propat because it lacks subject matter jurisdiction. RPost has brought this action under the Declaratory Judgment Act, 28 U.S.C. § 2201(a), seeking a declaratory judgment that U.S. Patent No. 6,182,219 (“the ‘219 Patent”) and U.S. Patent No. 6,571,334 (“the ‘334 Patent”) are both invalid and not infringed. The relevant part of the act is as follows:

In a case of actual controversy within its jurisdiction ... any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. 28 U.S.C. § 2201(a).

This is a patent infringement action, therefore, Federal Circuit law applies in this case. The act requires that there be “an actual controversy between the parties before a federal court may exercise jurisdiction over an action for a declaratory judgment”. EMC Corp. v. Norand Corp., 89 F.3d 807, 810 (Fed. Cir. 1996). Moreover, “[g]enerally the presence of an ‘actual controversy’, within the meaning of the Act, depends on ‘whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between the parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.’” Teva Pharms. USA, Inc. v. Pfizer, Inc., 395 F.3d 1324, 1331 (Fed. Cir. 2005)(quoting Md. Cas. Co. v. Pac. Coal & Oil Co., 312 U.S. 270, 273 (1941)).

In determining whether an actual justiciable controversy exists, the Federal Circuit has established a two part inquiry that focuses on the conduct of both the patentee and the potential infringer. Id. at 1333. First, there must be an explicit threat or other action by the patentee which creates a reasonable apprehension on the part of the plaintiff that it will face an infringement suit. Id. Second, there must be present activity on the part of the plaintiff which could constitute

1 infringement, or concrete steps taken with the intent to conduct such activity. Id. Each of the
2 the Declaratory Judgment plaintiffs have the burden of proof for establishing these two prongs.
3 Spectronics Corp. v. H.B. Fuller Co. Inc., 940 F.2d 631, 634 (Fed. Cir. 1991).

4 Even if the Court finds that there is an actual controversy, the “district court is not
5 required to exercise declaratory judgment jurisdiction, but has substantial discretion to decline
6 that jurisdiction”. Teva Pharms. USA, Inc., 395 F.3d at 1331; see also Wilton v. Seven Falls
7 Co., 515 U.S. 277, 286 (1995)(“Since its inception, the Declaratory Judgment Act has been
8 understood to confer on federal courts unique and substantial discretion in deciding whether to
9 declare the rights of litigants.”). However, “[w]hen there is no actual controversy, the court has
10 no discretion to decide the case”. Teva Pharms. USA, Inc., 395 F.3d at 1331.

11 **B. There Is No Actual Controversy Between Propat and Any of the Plaintiffs.**

12 This court lacks subject matter jurisdiction over the allegations against Propat because
13 there is no actual controversy between Propat and any of the Plaintiffs. The Plaintiffs cannot
14 individually establish the first prong of the test.

15 Upon the urging of the Plaintiffs in this case, Judge Selna in the Prior Pending Action
16 found that Propat is not the patentee of any patents owned by AuthentiX and does not have
17 standing to participate in a lawsuit related to those patents as a named party. [See Exhibits A &
18 B] Indeed, Judge Selna, upon the urging of RPost, found that Propat possessed merely a bare
19 license. Judge Selna’s opinion and final judgment held that the agreement between Propat and
20 AuthentiX does not confer upon Propat standing to sue for infringement. [See Exhibits A & B]
21 Propat has appealed that decision and the matter remains in the briefing stage. The relationship
22 between Propat and AuthentiX has not changed since the Court’s Final Judgment. [See Exhibit
23 C] The agreement that was the subject of the Court’s final judgment regarding standing remains
24 the only agreement between Propat and AuthentiX. [See Exhibit C] Therefore, based upon Judge
25 Selna’s ruling, Propat cannot bring a lawsuit against any of the Plaintiffs and neither can any of
26 the Plaintiffs to this case be in reasonable apprehension of a lawsuit.

27 Based upon these undisputed facts, Propat cannot be the patentee in the first prong of the
28 test. Neither could Propat have made any explicit threats or have taken other action to place any

1 of the Plaintiff's in reasonable apprehension of being sued. Indeed, RPost prior to filing this
2 lawsuit had successfully received an order in the Prior Pending Action stating that Propat cannot
3 bring a lawsuit for infringement. The test of whether Plaintiff's would be in reasonable
4 apprehension of being sued is an objective test. No reasonable person would be in apprehension
5 of being sued by Propat after they had just obtained an order from a district court that Propat
6 could not sue them for infringement. Allowing RPost to maintain this action would render Judge
7 Selna's order as well as the entire appeal process moot.

8 Unfortunately, RPost has engaged in this misconduct of filing this lawsuit without any
9 factual investigation in order to circumvent the appeal process and to avoid having the matter
10 proceed in the Central District of California before Judge Selna. It is telling that in the Prior
11 Pending Action, RPost submitted declarations from its CEO Mr. Zafar Khan to support its
12 motion to transfer venue from the Northern District of California to the Central District of Cal.
13 Now that Judge Selna has indicated that the RPost registered e-mail system does indeed infringe
14 the '219 Patent, RPost has filed this action in this Court in an effort to avoid having the matter
15 proceed before Judge Selna if Propat is successful on appeal.

16 More telling, however, is that the Plaintiffs' complaint lacks any specific factual
17 allegations that would support subject matter jurisdiction under the Declaratory Judgment Act.
18 Indeed, the complaint contains only generic conclusions. There are no factual allegations to
19 support the conclusions. Neither is there any specific factual allegations to support any specific
20 threats against each of the individual plaintiffs by Propat.

21 **C. Alternatively, the Court Should Exercise its Unique Discretion and Dismiss**
22 **this Action.**

23 The Supreme Court has indicated that the District Court has unique discretion in deciding
24 to entertain a case under the Declaratory Judgment Act. see Wilton v. Seven Falls Co., 515 U.S.
25 at 286. Based upon the undisputed facts in this case, the Court should exercise that discretion
26 and dismiss the action.

27 Propat is currently appealing the Prior Pending Action. If Propat is successful on appeal
28 then the case will be remanded for further proceedings. It is likely that Judge Selna will reinstate

1 his previously vacated orders relating to claim construction and infringement and set the matter
2 for trial. Conversely, if Propat is unsuccessful, then the finding of no standing will have been
3 upheld and Propat will continue to be unable to participate in a lawsuit as a named party under its
4 current agreement with AuthentiX. Indeed, any judgement that this Court would render with
5 respect to Propat and the identified patents would be meaningless because Propat would be
6 incapable of binding the patentee as a participant in the litigation. Therefore, it is respectfully
7 requested that the Court exercise its discretion and dismiss this action against Propat and allow
8 the matter run its course on appeal.

9 **II. THE COURT SHOULD DISMISS THIS ACTION BECAUSE IT LACKS**
10 **PERSONAL JURISDICTION OVER PROPAT**

11 Pursuant to Fed. R. Civ. P. 12(b)(2), this Court should dismiss this action against Propat
12 for lack of personal jurisdiction. It is well established that the Plaintiff bears the burden of
13 establishing personal jurisdiction over the Defendant Propat. see Schwarzenegger v. Fred Martin
14 Motor Co., 374 F.3d 797, 800 (9th Cir. 2004). Moreover, “because California’s long-arm
15 jurisdictional statute is coextensive with federal due process requirements, the jurisdictional
16 analyses under state law and federal due process are the same”. Id. at 800-01. Therefore, for a
17 “court to exercise personal jurisdiction over a nonresident defendant, that defendant must have at
18 least minimum contacts with the relevant forum such that the exercise of jurisdiction ‘does not
19 offend traditional notions of fair play and substantial justice’”. Id. at 801.

20 The Plaintiffs’ complaint does not contain any factual allegations related to an exercise of
21 personal jurisdiction. Indeed, there are no allegations that this Court may properly exercise
22 personal jurisdiction over Propat. The Complaint correctly states that Propat is a Texas
23 corporation with its principle place business in Houston, Texas. The Complaint, however, is
24 utterly lacking in any support for this Court’s exercise of personal jurisdiction and therefore
25 should be dismissed.

26 Propat is a corporation organized under the laws of the State of Texas. Its principle and
27 only place of business is located in Houston, Texas. [See Exhibit C] Propat does not own any
28 property in California, nor does it maintain any bank accounts in California. [See Exhibit C]

1 Propat does not have any clients or customers in California. [See Exhibit C] Propat does not
2 advertise in California. [See Exhibit C] Propat's only connection with California is its
3 prosecution of the Prior Pending Action. Based upon these undisputed facts and the complete
4 lack of factual allegations in the Plaintiffs' complaint, the Court should dismiss the action for
5 lack of personal jurisdiction.

6 **III. THE COURT SHOULD DISMISS THIS MATTER FOR IMPROPER VENUE OR**
7 **TRANSFER THIS CASE TO THE HONORABLE JAMES V. SELNA OF THE**
8 **CENTRAL DISTRICT OF CALIFORNIA**

9 **A. The Northern District of California is Not A Proper Venue for this Action.**

10 Pursuant to Fed. R. Civ. P. 12(b)(3), this Court should dismiss this action against Propat
11 because the Northern District of California is not a proper venue. Plaintiffs' cited statutory basis
12 for venue is Title 28 U.S.C. §§ 1391(b) and 1391(c). Section 1391(b) recites:

13 (b) A civil action wherein jurisdiction is not founded solely on diversity of
14 citizenship may, except as otherwise provided by law, be brought only in (1) a
15 judicial district where any defendant resides, if all defendants reside in the same
16 State, (2) a judicial district in which a substantial part of the events or omissions
17 giving rise to the claim occurred, or a substantial part of property that is the
18 subject of the action is situated, or (3) a judicial district in which any defendant
19 may be found, if there is no district in which the action may otherwise be brought.

20 Section 1391(c) recites

21 (c) For purposes of venue under this chapter, a defendant that is a corporation
22 shall be deemed to reside in any judicial district in which it is subject to personal
23 jurisdiction at the time the action is commenced. In a State which has more than
24 one judicial district and in which a defendant that is a corporation is subject to
25 personal jurisdiction at the time an action is commenced, such corporation shall
26 be deemed to reside in any district in that State within which its contacts would be
27 sufficient to subject it to personal jurisdiction if that district were a separate State,
28 and, if there is no such district, the corporation shall be deemed to reside in the
district within which it has the most significant contacts.

1 The Plaintiffs have not indicated under which sub-section of 28 U.S.C. § 1391(b), they
2 allege venue is proper. Neither have they set forth any facts upon which to support their
3 allegation of venue. Section 1391(b)(1) only applies if all defendants reside in the same State.
4 As set forth in the Complaint, Propat is a Texas corporation with its principle place of business in
5 Houston, Texas. Defendant AuthentiX is an Israel corporation with its principle place of
6 business in Israel. The two named defendants do not reside in the same State, therefore Section
7 1391(b)(1) does not apply.

8 Section 1391(b)(2), of Title 28, equally does not apply. This section is directed to “a
9 judicial district in which a substantial part of the events or omissions giving rise to the claim
10 occurred ...”. The allegation set forth in the complaint do not identify the Northern District of
11 California as the place where any of the events complained of occurred. Indeed, the complaint
12 contains no allegation that anything has occurred in the Northern District of California.
13 Therefore, Section 1391(b)(2) does not apply.

14 Finally, Section 1391(b)(3), of Title 28, also does not apply in this case. This subsection
15 only applies when no other proper judicial district can be found. In this particular case, the
16 Central District of California is a proper judicial district. Indeed, in the Prior Pending Action,
17 RPost requested that the case be moved to the Central District of California where they are
18 located. It appears that RPost is now attempting to avoid having this case heard by Judge Selna
19 because of his previous unfavorable ruling in regards to claim construction and infringement.
20 This Court should not reward such improper forum shopping and attempts to pit one judicial
21 district against another.

22 **B. Alternatively, the Court Should Transfer this Action to the Central District**
23 **of California.**

24 If the Court decides not to dismiss the action for the foregoing reasons, Propat
25 alternatively requests the Court to transfer this action to the Central District of California. The
26 authority for a Court to transfer a case to another Court is found in Title 28 U.S.C. § 1404(a),
27 which provides:

28 (a) For the convenience of parties and witnesses, in the interest of justice, a

1 district court may transfer any civil action to any other district or division where it
2 might have been brought.

3 “A motion to transfer venue lies within the broad discretion of the district court, and must
4 be determined on an individualized basis”. Inherent.com v. Martindale-Hubbell, 2006 U.S. Dist.
5 LEXIS 10790, *12 (N.D. Cal. March 10, 2006)(citing Jones v. GNC Franchising, Inc., 211 F.3d
6 495, 498 (9th Cir. 2000)). A two step analysis to determine when transfer is proper. Id. The
7 primary question is whether the case could have been brought in the forum to which transfer is
8 sought. Id. If the question is affirmatively answered then the Court must make a determination
9 of convenience and fairness. The Court may look to several factors to aid in making this
10 determination including the forum most familiar with the governing law, the Plaintiffs’ choice of
11 forum, the respective parties’ contacts with the forum, the contacts relating to the plaintiffs’
12 cause of action in the chosen forum, and the availability of compulsory process to compel
13 attendance of unwilling nonparty witnesses, and ease of access to sources of proof. Id. Each
14 of these factors weigh in favor of transferring the matter to Judge Selna’s Court in the Central
15 District of California. Importantly, Judge Selna, at the request of RPost, maintains a continuing
16 jurisdiction over the protective order governing confidential information exchanged in the Prior
17 Pending Action. That information included the source code and technical documentation related
18 to the operation of the RPost Registered E-mail system which is the basis for the current action.
19 Moreover, neither of the parties in this case has any substantial contacts with the Northern
20 District of California that would weigh in favor of this forum. The Plaintiffs’ principle place of
21 business is located in Los Angeles, California. A majority of the witnesses and other evidence is
22 located in the Central District of California. Indeed, it is expected that some witnesses will need
23 to be subpoenaed to testify. Further, Judge Selna has a unique understanding of the issues related
24 to this case including the ‘219 Patent as well as the parties and their counsel.

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1 Therefore, if the Court does not dismiss this action for the foregoing reasons, it is
2 respectfully requested that the Court transfer venue to the Court of Judge Selna in the Central
3 District of California.

4
5 THE DEFENDANT
6 PROPAT INTERNATIONAL CORP.

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was served on April 26, 2006, by electronic mail (e-mail) on the following individuals at the indicated e-mail addresses.

Henry Ben-Zvi
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Santa Monica, CA 90405

I declare under penalty of perjury that the foregoing is true and correct.

/s
Timothy W. Johnson, Esq.